Supreme Court, U.S.
FILED

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No. 93-468 SEP 14 1994

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In The
Supreme Court of the United States
October Term, 1993

TONY LEE, RAMACHANDRAN PALISSERY, RALPH TALARICO, EVE ARNOLD, AND, DAVID WEST, for themselves and all those similarly situated,

Petitioners,

v.

THE LIFE INSURANCE COMPANY OF NORTH AMERICA, THE UNIVERSITY OF RHODE ISLAND, MR. BLAISE MORRISSEY, AND, THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS BOARD OF GOVERNORS FOR HIGHER EDUCATION, individually, jointly and severally, in their corporate, official, and personal capacities,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Students at the university of Rhode Island, URI, alleged that URI created antitrust tie-ins of the "lock-in" type. Buying a *first* semester of URI tuition locked students into buying their *subsequent* semesters of university tuition from URI. URI had a *lawful* monopoly in the locked-in market, but URI, allegedly, *illegally* used its power in this market by conditioning its sale of subsequent semesters of URI tuition (the locked-in / tying products) on students *also* buying tied products: A) URI clinic health coverage, and, B) (for 40% of students) health insurance from the Life Insurance Company of North America, LINA. Students faced a cruel dilemma - either pay the mandatory clinic fees and insurance premiums, or, be expelled from URI. Students timely demanded trial by jury and sought antitrust treble damages. LINA, in a URI-distributed advertisement to all full-time URI students, fraudulently misrepresented the existence of a LINA policy. LINA conditioned its (fraudulent) coverage for any medical treatment outside URI (including psychiatric, contraceptive, and substance abuse counselling) on a student having first sought but not obtained treatment at URI. Both the clinic's coverage and LINA insurance included some coverage exclusively useable by women (pap smears, pregnancy testing, maternity coverage, etc.). URI and LINA intentionally billed males for this solely female coverage so as to obtain the males' money for nothing.

1. Does the First Circuit's conclusion, of no Fourteenth Amendment Equal Protection violation, conflict with the "irrational object of disfavor" standard in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), is the First Circuit's conclusion inconsistent with law in the Third, Ninth, and Eleventh Circuits, should the Court hold that a malevolent or benign motivation of a defendant is never needed for a violation of the Equal Protection Clause, and, does a State's preventing or impeding purchase of gender-

tailored health risk coverage violate said Clause ?

2. Given that *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992) requires a highly fact-specific inquiry to determine whether an alleged antitrust "lock-in" is present, has the First Circuit, in a complex antitrust case, so far departed from the accepted and usual course of judicial proceedings as to warrant the Supreme Court's supervision, where, in analyzing a F.R.Civ.P. 12(b)(6) motion, the First Circuit: a) disregarded many of the appellants' allegations, b) premised its affirmance at least in part on its own "factual" assumptions (which were incorrect *and* inconsistent with appellants' allegations), c) disregarded some of the appellants' arguments, d) noted but did not respond to one of appellants' arguments, and, e) attributed a specious argument to appellants that they never made ?

3. Has the First Circuit misconceived *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992), such that it mistakenly regards as a virtual prerequisite for an antitrust tying arrangement "lock-in", that the initial purchase must be an unamortized investment in an expensive complex durable good with little resale value, or other product with similar attributes ?

4. Do the First Circuit's erroneous assumptions of fact and its disregard of many of the students' allegations, obstruct a Seventh Amendment right to have the facts decided by a jury, given students timely demanded trial by jury and sought antitrust treble damages ?

5. Does the Constitution contain a liberty / privacy right to contract with a doctor of one's own choice, free from State interference (absent a compelling State interest), did the First

Circuit's rejection of said right conflict intolerably with Supreme Court precedent, and, if the Court has not already recognized said right should it do so, and, was said right violated where the State's interference consisted of facts stated below in the petition *plus*: **A)** a State university mandates pre-paid clinic fees (which fees absorb students' health dollars, thereby causing them to pay twice if they consult a non-university / non-State doctor), **B)** the university's clinic coverage has serious defects and a content and quality that students largely do not know and cannot know because of the university's secrecy, **C)** the university clinic incorrectly advertises it provides "top quality health care", **D)** the clinic is located in a building which the university has previously admitted "limits the quality of care" to students and was "inadequate", "perhaps dangerous", and, "filled with [fire] violations", **E)** the students' personal medical records are stored in said building, **F)** the university's selected student health insurer fraudulently advertised in university-distributed materials that said insurer drafted a policy for the students yet no policy had been drafted, **G)** the university never informs students of said fraud though aware of it, **H)** said insurer refuses to reimburse students for any medical treatment obtained outside the university clinic (including for psychiatric, contraceptive, and substance abuse counselling) unless the student first seeks but does not obtain treatment at the university, **I)** the university requires students confronted by medical emergencies later to inform the university's clinic of actions taken, and, **J)** students' personal medical records are under the custody of the clinic's administration, which was implicated in all of A)-I) above ?

LIST OF PARTIES

The caption of this petition identifies all parties in the United States Court of Appeals for the First Circuit, other than the past and present presidents of URI, namely, Mr. Eddy and Mr. Carothers, both of whom are only parties to a State law claim of gender discrimination. URI students Eve Arnold and David West had a motion to intervene granted in the District Court, were listed as parties in the appeal, and presumably are therefore properly petitioners in this petition. A class certification determination was stayed by stipulation of the parties pending resolution of the defendants' F.R.Civ.P. 12(b)(6) motion. Thus, the issue of class certification has never been reached. Nonetheless, if the Court decides the questions presented, the legal rights of tens of thousands of URI students, past present and future, would effectively be decided. (Decisions as to most of the questions presented would affect not only URI students, but the Nation - as described below in this petition.) Rhode Island's Board of Governors for Higher Education is not mentioned below in this petition as all of its misconduct appears to have been nonfeasance; it failed to do anything to prevent URI from committing URI's alleged illegalities.

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As to question presented # 1: the First Circuit's conclusion, of no Fourteenth Amendment Equal Protection violation, conflicts with the "irrational object of disfavor" standard in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), the First Circuit's conclusion is inconsistent with law in the Third, Ninth, and Eleventh Circuits, the Court should hold that a malevolent or benign motivation of a defendant is never needed for a violation of the Equal Protection Clause, and, for a State to prevent or impede purchase of gender-tailored health risk coverage violates said Clause. -- pages 7-11

As to question presented # 2: the First Circuit made grave F.R.Civ.P. 12(b)(6) methodological mistakes and other serious analytical errors that warrant the Supreme Court's supervision. As to question presented # 3: the First Circuit fundamentally misinterpreted the nature of an antitrust "lock-in" in *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992). -- pages 11-26

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The Opinion of the court of appeals is reported at 23 F.3d 14 (1st Cir. 1994). It is in the appendix, under separate cover, at App. 1A-16A. The Memorandum and Order of the district court is reported at 829 F.Supp. 529 (D.R.I. 1993). It is at App. 17B-40B.

SUPREME COURT JURISDICTION

A corrected judgment was entered in the First Circuit on May 4 1994. An Order of the First Circuit denying a timely petition for rehearing with a suggestion for rehearing en banc, was entered on June 16 1994. Jurisdiction in the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

Quoted in pertinent part in the appendix are: U.S. Const. amend. VII, U.S. Const. amend. IX, U.S. Const. amend. XIV, R.I. Const. Art. VI §§ 1 and 2, 15 U.S.C. § 1, R.I. Dept. of Business Regulation's Reg. 23 Part XI - Filing of Forms and Rates, §§ 1, 2, and 3, and, a host of States' laws potentially affected by the Equal Protection issues.

STATEMENT OF THE CASE

Statement of the facts (in addition to facts stated in the questions presented section), and, in some of the footnotes, corrections of some of the First Circuit's many errors of fact

URI, Rhode Island's only State university, mandated (and still mandates) that all full-time students pay a university health service (UHS) clinic fee (except graduate students with

HMO or full military benefits coverage[1]). Each semester about 10,000 students paid the mandatory UHS fee. URI also had a mandatory health insurance requirement which also applied to all full-time students (and still does). Students were required to buy university-billed health insurance or buy so-called "comparable" insurance by a deadline date. URI threatened to expel students from URI if they did not pay the UHS fee, the university-billed insurance premiums, and, URI's tuition charges.

The waiver option for "comparable" insurance was a charade because URI defined "comparable" out of existence. R.I. Blue Cross and all HMOs[2] were explicitly excluded - most of the competition. "[C]omparable" insurance was defined as covering all services[3] *performed at UHS, which is unlicensed by the State of Rhode Island*;[4] however, insurers do not cover treatment at unlicensed facilities, presumably due to the risks associated with such facilities. The "option" was part of an illegal ultimatum, as State law proscribes *in toto*: URI's mandatory health insurance requirement, URI's mandatory UHS fee, and, URI's sanction of expulsion for

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[1] Appellate Opinion at App. 3A n.1 incorrectly states "Graduate students are not required to pay the UHS clinic fee, provided they have health insurance coverage that meets URI's requirements." In fact, all graduate students with their own health insurance, of any kind, must pay the UHS fee. The only exemptions to the UHS fee are stated above.

[2] not just R.I. HMOs were excluded, which the First Circuit mistakenly indicates. App. 4A.

[3] including services from which UHS derived extra fees, i.e. in addition to the mandatory UHS fee.

[4] The First Circuit's Opinion is incorrect in failing to note "comparable" coverage must cover all services performed at UHS.

non-payment of the mandated charges.[5] And, the "option" expired on a URI-set date and so unequivocally did not exist after that date. To summarize re. the supposed non-LINA "option": 1) option not legally cognizable under federal law as illegal under State law, 2) option defined out of existence by URI (nothing "comparable"), and, 3) not even a bogus option remained after the so-called "waiver" deadline expired.

40% of students, after not submitting a so-called "waiver card" by URI's deadline date, no longer had even a charade of an option not to pay the URI/LINA health insurance premium, and they paid it. For this 40%, *after* expiration of URI's illegally set deadline,[6] URI *therefore unequivocally* conditioned sale of URI tuition on purchase of URI/LINA insurance; for this 40% it was mandatory. To avoid an outcry among the other 60% of students, who successfully resisted URI's pressure and bought non-LINA insurance, URI shrewdly did not try to enforce its impossible requirements for "comparable" insurance. Ironically, the insurance that these 60% of students bought was not "comparable" to LINA insurance, it was *incomparably* better; it *existed* but LINA's did not. LINA had fraudulently advertised the existence of a LINA policy to all URI students. *After* suit was filed, LINA admitted the policy did not exist at

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[5] URI asserts the R.I. legislature delegated legislative powers to URI that authorize URI to impose: the UHS and LINA charges, and, the sanction of expulsion for non-payment. URI could not quote *any* statutory language to satisfy the R.I. Const. Art. VI §§ 1 and 2's non-delegation principle; R.I.'s statutes simply have no such language. "*As long as* the Legislature demonstrates standards or principles to confine and guide the agency's power, this court will ... sustain the delegation." (Italics added.) *Bourque v. Dettore*, 589 A.2d 815, 817-818 (R.I. 1991). Rhode Island's courts have not addressed URI's assertion of delegated legislative power.

[6] the deadline, being part of URI's mandatory insurance requirement proscribed by State law, was therefore also illegal.

the time of its advertisement.[7] Several months after its advertisement, LINA drafted a policy which it submitted to the State's Department of Business Regulation (DBR). Rhode Island insurance regulatory law requires all health insurance policies to be of a DBR-approved form *prior* to sale.[8] Not only was the policy submitted to DBR months after the sale, and thus illegally late, DBR ruled that the policy failed to meet the law's "minimum standards"[9] and so disapproved it.

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[7] The First Circuit refers to LINA's fake insurance as though it were real insurance. Appellate Opinion at App. 3A. Given the non-existence of a policy, there was, as a matter of law, no insurance. "[T]he fundamental principle of insurance [is] that the insurance policy defines the scope of risk assumed by the insurer from the insured." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 131 (1982). LINA protests it paid out on "claims" - a misnomer as there was no policy. True, LINA paid out *some* monies, but to what extent and on what basis are unknown. Discovery was minimal and stayed by the District Court. Documents obtained in discovery suggest LINA's pay-outs were illegally late in most instances. Whatever LINA paid out was not insurance coverage, and helped to conceal the non-existence of a LINA policy. LINA invented the contract terms *during* the coverage period, and paid out as it pleased. "**[I]n antitrust cases, where the 'proof is largely in the hands of the alleged conspirators,'** *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 7 L.Ed. 2d 458, 82 S.Ct. 486 (1962), **dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.**" (Emphases added.) *Hospital Bld. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). URI may have conspired in LINA's fraud as a quid pro quo. LINA conditioned *all* coverage outside URI on students first going to URI. E.g. in FY 1991 UHS collected $459,992 from its extra revenue-raising services - those *not* covered by the mandatory UHS fee.

[8] R.I. Department of Business Regulation's Regulation 23 Part XI - Filing of Forms and Rates, §§ 1 and 2, App. 45D-46D.

[9] under DBR's Regulation 23 which aims to protect consumers against deceptive insurance practices. Reg. 23 is described in *Formisano v. Blue Cross of Rhode Island*, 478 A.2d 167, 170 (R.I. 1984), App. 44D-45D. Reg. 23 is itself 93 pages long.

LINA, however, illegally continued to use it.[10] Over eight months after sale, LINA amended the form of the policy such that DBR was able to approve its form. LINA never informed DBR (nor students) of LINA's illegal sale of a non-existent policy, nor, of LINA's illegal continued use of a DBR-disapproved policy form.

Buying non-LINA insurance necessarily entailed wasting money on URI's duplicative mandatory UHS fee, which covered primary health care, which was also covered by non-LINA insurance (but not by LINA). Since at least 1977 URI has known its UHS fee was "forcing them [i.e students with their own insurance] to pay double coverage for health care."[11]. Rather than compete with URI for the students' health risk coverage business, LINA conspired with URI to split the coverage. UHS covered primary care and LINA non-primary care (e.g. accident coverage). This tactical split enabled LINA to cost less than other insurance, as other insurance included both primary and non-primary coverage.[12]

URI, like many universities, has been selling a "package" each semester that contains numerous academic courses and two different forms of health risk coverage: university clinic coverage (which is like HMO coverage in that the coverage is in the form of treatment, not money),

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[10] violating DBR's Regulation 23 Part XI - Filing of Forms and Rates, § 3, App. 46D.

[11] 1976-77 UHS Report.

[12] The First Circuit makes the dovetailing appear to be a feat LINA accomplished for the student's benefit, rather than the ingenious anti-competitive tactic it is. Appellate Opinion at App. 3A. Further, non-LINA insurers could not offer dovetailed coverage as UHS keeps secret the specifics of its coverage. Non-LINA insurers had every right but no chance to compete for the students' primary care coverage business.

and (at least purportedly) health insurance coverage.

> "[B]ecause Kodak was a summary judgment case, rather than a Rule 12(b)(6) case, appellants argue that they did enough to withstand URI's motion to dismiss simply by alleging the existence of unspecified 'information' and 'switching' costs, which must be credited for Rule 12(b)(6) purposes." Appellate Opinion at App. 9A-10A.

First, appellants made no such argument, and second, they alleged[13] *numerous* specifics as to "information" and "switching" costs and considerations, most of which allegations the First Circuit disregards.[14] These very detailed allegations are stated in the argument section below.

Both the UHS coverage and LINA's fake insurance contained an exclusively female health risk coverage component (e.g. for pap smears, pregnancy testing, maternity

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[13] in their appellate brief, which was at their first opportunity, having had no opportunity in the District Court, because *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992), laying emphasis on information and switching considerations, was delivered *after* the amended complaint was filed, and the District Court dismissed the antitrust claims with prejudice. The First Circuit must surely have overlooked these facts (though they were briefed), as, by citing to *University of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1219 n.20 (1st Cir. 1993), which refers to the "due diligence" required in amending a complaint, the First Circuit implies plaintiffs failed to exercise due diligence - that they should have amended their amended complaint to allege "switching costs". App. 13A. To expect an amendment to said pleading before Senior District Court Judge Pettine ruled and in anticipation of however he might interpret *Kodak*, would be an unfair and unprecedented standard.

[14] whether intentionally or by oversight - which disjunct applies throughout this petition wherever the First Circuit is asserted to have disregarded a fact or argument.

coverage, etc.). URI, Mr. Morrissey (the Director of UHS), and LINA, used facially gender-neutral billing, i.e., males and females were billed the same amount. URI and LINA intentionally billed in this way "because of"[15] and not "in spite of"[16] the *foreseen and desired outcome*, i.e., the windfall they would obtain from males paying them for solely female coverage - something for nothing. URI and LINA were *aiming* for the males' money in return for nothing, as they *wanted* it in return for nothing. They obtained the males' money not merely with an "awareness"[17] that it was a windfall. They *wanted* the "adverse effects"[18] to *males*.

Jurisdiction in the court of first instance

Jurisdiction in the United States District Court for the District of Rhode Island was grounded in: 28 U.S.C. §§ 1331, 1337(a), 1343(a), and 1367(a).

ARGUMENT / REASONS FOR GRANTING THE WRIT

As to question presented # 1: the First Circuit's conclusion, of no Fourteenth Amendment Equal Protection violation, conflicts with the "irrational object of disfavor" standard in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), the First Circuit's conclusion is inconsistent with law in the Third, Ninth, and Eleventh Circuits, the Court should hold that a malevolent or benign motivation of a defendant is never needed for a violation of the Equal Protection Clause, and, for a State to prevent or impede purchase of gender-

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[15] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

[16] Id.

[17] Id.

[18] Id.

tailored health risk coverage violates said Clause.

Bray, which the First Circuit overlooked, construed 42 U.S.C. § 1985(3)'s "equal protection" content. En route to its § 1985(3) holding, the Court implied that a defendant, in order to have violated the *Fourteenth Amendment's* Equal Protection Clause, must, inter alia, have been motivated by an underlying "malevolent *or* benign" feeling towards the plaintiff-class *because it is that class.*[19] However, the Court also implied that, in certain circumstances, said motivation need not be alleged in order to state a valid Fourteenth Amendment Equal Protection claim.

> "Some activities may be *such an irrational object of disfavor* that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can be readily presumed. A tax on yarmulkes is a tax on Jews."[20] (Italics added.) *Bray*, 113 S.Ct. at 760.

The petitioners have *not* alleged that URI and LINA were motivated by either malevolent or benign feelings towards the plaintiff-class of male URI students. URI and LINA *are* alleged to have intentionally billed males for solely *female coverage* so as to obtain the males' money for nothing. Jews have every right to wear yarmulkes. Males have every right to use health risk coverage exclusively tailored to males - this activity clearly is "such an irrational object of disfavor"

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[19] Based on a *combined* reading of *Bray*, 113 S.Ct *at* 759, *at* 760 "[t]he **same** principle applies ..." (emphasis added), and, *at* 761 n.4 first full ¶ in right column.

[20] Taxation is a State activity, so, by saying "[a] tax on yarmulkes is a tax on Jews", the Court is speaking to the Fourteenth Amendment's Equal Protection Clause.

that males need not allege a malevolent or benign motivation in order to state a valid Equal Protection claim.

Besides, the Court should abandon both the requirement of a "malevolent or benign" motivation,[21] and, its "irrational object of disfavor" exception[22]. Stare decisis would not be offended, as *Bray* was not a Fourteenth Amendment case. For the "discriminatory purpose"[23] element of a Fourteenth Amendment Equal Protection violation the Court should only require an intent behind the defendant's act "at least in part" to achieve objectively "adverse effects" to the plaintiff-class as a class.[24]

URI and LINA intended their actions to cause objectively adverse effects to the class of male students as a class. URI and LINA wanted males to pay them something

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[21] **The Court's "malevolent or benign" motivation requirement is deeply misguided, because a class can be as much (or more) hurt by a defendant who felt indifferent towards it, as by a defendant who was motivated by a malevolent or benign feeling towards it.**

[22] Justice Stevens' criticism of the "irrational object of disfavor" language in *Bray*, 113 S.Ct. at 788, holds true in the Constitutional context. However, the Court should not abandon this exception if the Court retains the "malevolent or benign" motivation requirement, as the exception gives at least some victims (including the petitioners) a valid Equal Protection claim against "merely" indifferent defendants.

[23] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Id. for the "at least in part" and "adverse effects" quotes, below.

[24] This, essentially, is Justice Stevens' reading of *Feeney*, 442 U.S. at 279, in *Bray*. Unlike Justice Stevens, Justice Scalia in *Bray* interpreted *Feeney*'s "at least in part" and "because of" clauses to refer *only* to a motivation *antecedent* to the above-described targeting intent, and *not* to said intent. To Stevens, J., said intent satisfies *Feeney*'s "discriminatory purpose" requirement (*Bray*, 113 S.Ct. at 787), but, to Scalia, J., said "purpose" requires said intent *plus* an antecedent malevolent or benign motivation.

for nothing. They *intentionally* billed the same amount to males and females so as to achieve that desired outcome. The outcome was not a coincidence - not a mere *statistically* disparate effect upon males as opposed to females.[25] Rather, *all* males *necessarily* were exploited by being billed for solely female coverage,[26] and, *necessarily*, *no* females were exploited.[27] This is a 100% certain impact on 100% of the males and on 0% of the females - an *absolute* impact more extreme (in that sense) even than the Equal Protection

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[25] unlike *Washington v. Davis*, 426 U.S. 229 (1976) and *Feeney*, where Equal Protection was not violated. Re. *Davis* and *Feeney*, relief may one day come to the class. Negroes may receive a better education and more pass a police test - *Davis*. More females may become veterans and enjoy a veterans' hiring advantage - *Feeney*. Yet, *no* male will *ever* be a female - the present case. The presently alleged Equal Protection violation stems from the *defendants'* act *itself* (sly billing), unlike in *Davis* and *Feeney*, where the claims were really based on *past* discrimination by *non*-parties.

[26] Central to the holding of no Equal Protection violation in *Gedulig v. Aiello*, 417 U.S. 484, 496 (1974) was that the actuarial value of the insurance was equal for men and women. Notably, URI's males obtain *less* for their health risk coverage dollar than females obtain for theirs.

[27] Females did not make a like Equal Protection complaint - that they were paying for coverage for exclusively male health risks (e.g. prostrate cancer). In the students' age-group, female health risk coverage costs more than male health risk coverage, and defendants knew that. Unisex policies cost more than male policies and less than female policies. Quite possibly URI males were subsidizing URI females, and if so, the URI females had no Equal Protection injury. Much insurance legitimately groups consumers, but only those who share the same risks in kind, if not degree. Males and females have health risks unique to their genders - differences in *kinds* of risk. For a State to prevent or impede a person from buying health risk coverage that excludes coverage solely useable by the opposite sex, surely violates the Equal Protection Clause. **If that is true, mandatory *unisex* health risk coverage at State universities (App. 47D) is unconstitutional, so are State laws that impede persons in the above-stated manner (App. 48D-50D), and, interpretation of States' equal protection clauses is affected (App. 50D-52D).**

violation in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)[28]. *Flores v. Pierce*, 617 F.2d 1386, 1389 (9th Cir. 1980) cited *Yick Wo* for the idea that certain adverse effects dictate discriminatory "intent" was present. The "or" in "intent or motive" in *Flores*, 617 F.2d at 1389, shows the Ninth Circuit does not require an underlying discriminatory "motive"; discriminatory "intent" suffices. The sufficiency of "intent", and, the necessary inference of "intent" from certain adverse effects, are reflected in *Ammons v. Dade City, Fla.*, 783 F.2d 982, 988 (11th Cir. 1986), and in *Comm. of Pa. v. Flaherty*, 983 F.2d 1267, 1273 (3rd Cir. 1993). In contrast, the First Circuit required students to allege a discriminatory *motive* - that is the only possible rationale within its Opinion for rejecting the students' Equal Protection claim.

As to question presented # 2: the First Circuit made grave F.R.Civ.P. 12(b)(6) methodological mistakes and other serious analytical errors that warrant the Supreme Court's supervision. As to question presented # 3: the First Circuit fundamentally misinterpreted the nature of an antitrust "lock-in" in *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992).

Introduction to facts and law re. questions # 2 and # 3

In this petition, as in *Kodak*, "package-pricing" means judging, with a solid basis, prior to any initial purchase, the *overall value* of a multi-part package bought over time, composed of: an initial purchase that later leads to a second purchase or purchases, that still later lead/s to a third purchase or purchases. By a "locked-in" product is meant a second stage purchase. The locked-in product is also the

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[28] All Chinese laundries in San Francisco were almost (but not absolutely) certain to be forced out of business by a facially-neutral ordinance which reserved in the enacting body arbitrary powers of discretion. No Caucasian laundry was hurt by the ordinance.

"tying" product that results in purchase of the third product/s, which is/are the "tied" product/s. To package-price requires that the consumer, *prior* to any initial purchase, at least have a solid basis for predicting, with respect to *every* part of the package (including the tying and tied parts which may be bought years after the initial purchase): its price, content, quality, and existence. If a consumer *is* able to judge whether the package is good or bad (i.e. package-price), if the package *is* bad, the consumer can avoid the package, by not buying the initial purchase, assuming freedom of choice not to buy it. URI's packages stretched over four or more years[29] and consisted of: a first semester of URI tuition (the initial purchase), seven or more subsequent semesters of URI tuition (the locked-in / tying products), at least eight semesters of UHS fees (all but the first being a set of tied products), and, at least eight semesters of URI-billed insurance premiums (all but the first being another set of tied products).

URI has little market power in the initial purchase market but monopoly power in the tying product market.[30] The First Circuit contends that URI students were not really locked-in to buying the tying products (subsequent semesters of URI tuition), that therefore URI's market power is correctly measured in the initial purchase market (not in the tying product market) and thus that students fail to allege the "appreciable economic power" (AEP) required for an illegal tying arrangement. Yet a lock-in *did* exist, as shown below. Thus, URI's power in the tying product market is *not* correctly considered to be only as significant as URI's small power in the initial purchase market, but rather *is* properly measured by URI's monopoly power in the locked-in/tying

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[29] For instance, undergraduate degrees typically last four years and doctoral degrees longer.

[30] Each semester the vast majority of URI students return to URI to continue their education rather than transfer to a competing university.

market, of subsequent semesters of tuition for URI students.

The First Circuit asserts the students lack the sort of "information" and "switching" allegations that the ISOs used to defeat Kodak's motion for summary judgment; *Kodak*, 112 S.Ct. 2072. However, the First Circuit grotesquely mishandled the students' allegations. Students *did* allege "information" facts sufficient to show the impossibility of package-pricing URI's package. Students *did* allege "switching" facts sufficient to show the impracticability (or for some students the impossibility) of switching to another university after enrolling at URI. These highly detailed "information" and "switching" facts are stated and analyzed below. The First Circuit disregarded all of them, which flouts F.R.Civ.P. 12(b)(6) law[31] and is highly unjust.

Information facts

Nobody can predict four or more years into the future the price,[32] content, quality, or even existence of the various

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[31] **"When deciding a motion to dismiss, the court must accept the allegations of the complaint as true.** *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980) (per curiam). **The court must also examine the alleged facts in the light most favorable to the plaintiff, and the complaint may only be dismissed if 'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle [him] to relief.'** *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)." (Emphases added.) *Fisichelli v. City Known as Town of Methuen*, 653 F.Supp. 1494, 1497 (D. Mass. 1987).

[32] Tuition fees constitute *most* of the cost of university packages. Future URI tuition costs were (and are) uncertain because they depend in large part on the State's economy (which in turn largely depends on the regional, national, and world economies), and on how much money the State appropriates for higher education, and how much of that goes to URI. During the 1990-91 year students were billed an unexpected "one-time student fee of $90" - letter of then URI President Eddy to the students, citing the State's "fiscal crisis". Further analysis concerning price unpredictability appears below, as does analysis of the unpredictability of

parts of URI's package: UHS coverage, URI-selected health insurance, and, URI tuition. Not even URI can make such predictions, which is why URI's student catalogs state that all of URI's prices are subject to change "without notice"[33].

The First Circuit argues that students have not alleged unavailability of past prices of UHS fees, and, that using such data, students could have predicted future UHS price increases. In their motion for a rehearing, students did allege that URI made no effort to publicize past price data (regarding *any* of its charges), and, that for thousands of applicants to obtain it would be impossible as it is only on file in URI's archives, applicants do not even know of that source, and, even if they did, the logistics of thousands of applicants queuing up to obtain it would make it effectively unobtainable. Further, even armed with all the UHS fee data the First Circuit refers to, the alleged predictability of UHS price increases is implicitly based on unstated assumptions of fact[34], i.e. regarding the very complex and *not understood*

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the content, quality, and existence, of the various parts of URI's package.

[33] The First Circuit attributes a specious argument to appellants that they never made, i.e., that the unpredictability of UHS fees and LINA premiums is because "URI and LINA reserve the right to increase these charges each year". Appellate Opinion at App. 11A. This is incorrect in several ways. First, URI warns that it can change fees "without notice", not merely "each year". Second, LINA reserved no such right and made no such warning. The First Circuit is confused and incorrect in believing LINA was URI's student insurer during 1987-1993 as LINA allegedly was the insurer only in 1990-1992. (Appellate Opinion at App. 12A n.10). Third, URI's "without notice" caveat *reflects* the uncertainties in the world that affect the price, content, quality, and existence, of the various parts of the URI package. URI's caveat is not the cause of these uncertainties nor do students allege it is.

[34] Raw price data in itself supports no logical inference, so if the First Circuit is not implicitly assuming more facts, it is making a fallacious inductive inference - that future price increases will be similar to past price increases.

causes of price increases for health care and health risk coverage - causes which lawyers, doctors, hospitals, insurers, drug companies, politicians, and others with vested interests, attribute to each other. The First Circuit provides no reason to support its assertion that the UHS price increases were predictable. It merely lists the increases[35] and in effect says "see", but seeing backwards with hindsight is not the test. The UHS fee issue is whether a four year (or longer) solid predication of UHS fees was feasible (based on what was knowable without prohibitive cost[36]) to a URI applicant *prior* to his/her *first* semester. The increases were not predictable because their causes are *still* not understood. Also, any serious *attempt* to make a solid prediction would have required professional advice, which would have cost far more than the UHS fee increases themselves.[37]

Discovery was minimal, and contested until stayed by the District Court, and students *still* know too little about the content of UHS coverage,[38] and the quality of medical service at UHS, to make an informed comparison with any other university's clinic coverage and service, even assuming such data exists elsewhere - another implicit (and likely incorrect) factual assumption of the First Circuit. URI *still* refuses to release UHS reports for the last ten years, which would shed light on its coverage and quality of service, given that the

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[35] App. 12A n.10.

[36] *Kodak*, 112 S.Ct. at 2085-2087.

[37] UHS fees (for all full-time students except graduates with HMO or military benefits coverage): 1987-88 $179, 1988-89 $188, 1989-90 $200.50, 1990-91 $227.00, 1991-92 $248, 1992-93 $312.00.

[38] URI only divulged in approximate terms the content of UHS coverage *after* a discovery struggle, and, treatments requiring a specialist were merely "subject to availability of specialist" - a "not on the menu today" approach to delivering health services that shows the value of UHS coverage was uncertain or at least unknowable to students.

1977 UHS report admitted UHS facilities were "perhaps dangerous" to students,[39] and the 1972 UHS report admitted UHS was filled with fire violations[40]. UHS covered primary care, but UHS was closed during all URI holidays - about one third of the calendar year (including URI holidays during semesters, e.g. spring break). URI-billed insurance did not cover primary care. This caused a gaping hole in primary care coverage during URI holidays for all students who paid the URI-billed health insurance. URI and LINA *never* disclosed this gaping hole. Thus, the 4,000 LINA-paying students did not know, prior to enrollment at URI, that URI would be exposing them to *no primary care coverage during all URI holidays*.[41] Without such foreknowledge, students could not possibly judge the value of the UHS + LINA "product". Students cannot fairly be required to have foreknown the gaping hole in coverage, because, a fair assumption was that URI's chosen insurer would cover primary care whenever UHS was closed, especially as URI made UHS fees and insurance mandatory.

Regarding the URI-billed health insurance, nobody can know four years in advance whether URI will even require students to have health insurance. As recently as "in 1988-1989 health insurance was voluntary for all students"[42]. Further, nobody can foreknow the content of coverage that

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[39] "Health services is functioning in physical facilities which are inadequate; perhaps dangerous and most certainly anxiety provoking for staff and clients. Such a situation limits the quality of care we are able to give our student enrollment." 1977-78 UHS Report.

[40] "The State Fire Marshall has found the present building filled with violations." 1972-73 UHS Report.

[41] and they would only have found out later the hard way, i.e. by needing primary care during a URI holiday, and either paying for it themselves or foregoing it.

[42] URI's answer to plaintiffs' interrogatory 13.

will be offered by private health insurers to university students, still less its quality or price. LINA's letter to the students' counsel[43] indicates that universities typically refuse "off-the-shelf" policies thereby leaving insurers unable to write a policy "until shortly before the academic year". However, the unpredictability of LINA "insurance" was even greater, as LINA fraudulently misrepresented the very existence of its own insurance policy - the advertised "policy" had not even been drafted at the time of sale. URI even knew the "policy" was not on file at UHS and that LINA had advertised it was at UHS. The only realistic chance to predict this sort of sophisticated insurance fraud and the violations of State insurance regulatory law, is to have witnessed these before, but students, when they first enroll, have not seen these before.

Yet even if LINA's policy had existed, comparative shopping for health insurance would have been impossible as many health insurance policies differ in innumerable ways that defy meaningful comparisons, like apples and oranges. Further, the cost of market research to discover the value of policies (to the limited extent some can be intelligently valued) would far exceed any savings realized thereby.[44] To judge the value of one's health risk coverage dollar, one needs: medical,[45] legal,[46] and statistical knowledge,[47] (or

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[43] at page 2 of exhibit C attached to the Complaint.

[44] Unlike for other complex products, such as cars or televisions, there exist no "Consumer Reports" (nor other publications) that evaluate university clinics or student group health insurance policies. **Few products in our society are more complex and less understood by consumers than health risk coverage.**

[45] Laymen do not know the body's many and complex ailments.

[46] To understand any given health insurance policy requires hours of close analytical reading, even assuming it is coherent and unambiguous. Technical language is used, and to know whether it is insurance industry

access to such expertise, which is very costly), knowledge of one's own personal medical risks,[48] plus, knowledge of the competence of the medical and administrative staff at the university clinic (or HMO), and, of the quality of their buildings and equipment. Of these listed items, university applicants only know, at most, their own medical risks.

As for academic programs, before students enroll, most do not *know* what their "major" will be, and thus *cannot* do comparative-shopping between universities. Also, there is no objective data on the educational quality of different universities' numerous academic courses. Specific courses often differ in standard from a university's overall reputation, which anyhow may be inaccurate. Further, Rhode Island has been in a fiscal crisis for over six years, the State's educational funding has decreased, and, the very existence of some of URI's academic courses has been threatened.[49]

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terminology or legal language requires knowledge of the law. Often the language is ambiguous, and university applicants (most of whom are high school students) cannot fairly be expected to know that insurance policy ambiguities are construed against the insurer - so students would be left unsure as to the meaning of an ambiguous policy.

[47] of the incidence of different sorts of health risks in the group of which one is a member, here, young adults.

[48] Also, a young, healthy, and not reckless adult (i.e. at low risk), with some savings, may care to insure *only* against catastrophic loss (which would wipe out those savings), an option URI denies its students. In other words, one's own personal finances can play a role in one's health risk coverage decisions.

[49] E.g. "Governor Sundlun surprised faculty at the University of Rhode Island's Graduate School commencement yesterday when he announced that a recent order to cut $ 1.3 million in academic programs will be softened." Providence Sunday Journal at § B p.1, May 22 1994. **Discovery was stayed, and students had no opportunity to seek facts from URI that would show the full extent of the uncertainty of URI's courses.**

The above "information" facts demonstrate the unpredictability of the price, quality, content, and *even existence*, of the many products of a URI package[50]. Thus students could not possibly package-price URI's package nor any comparable university's package. The First Circuit blundered hideously by disregarding *all* of the above "information" facts. Its conclusion that no lock-in exists also stems from its incorrect and implicit assumption that URI informs students they will be billed UHS fees and health insurance premiums for their *entire* (four year or longer) degree course.[51] URI's materials state prices only for the *first* academic year and do not comment at all about any charges that may or may not be billed beyond the first year.

Switching facts

The initial purchase is a first semester of URI tuition. Tuition cannot be resold, is non-transferable, and thus worse than a Kodak copier which at least has some resale value. The First Circuit overlooked the non-transferability of tuition.

The First Circuit's "switching" analysis disregards the problems of switching from URI to another university, and the reasons for not wanting to switch. To switch from URI, students would face numerous obstacles: academic,[52]

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[50] E.g., 24 products in a 4 year package; with two semesters per year, and three broad types of products per semester (tuition, UHS coverage, and health insurance) there are, therefore, 24 products (2 x 3 x 4 years = 24).

[51] Appellate Opinion at App. 12A-13A, 14A, and 15A.

[52] Whether any given URI credit can be transferred (in whole, in part, or at all) turns on specifics, e.g. compatibility with the other university's academic program, degree of specialization of the credit sought to be transferred, and the student's grade obtained on the URI credit/standards at the other university. Colleges set their own policies about accepting credits from other institutions. Courses in a major may not meet the requirements of the major at the receiving institution, which may want the

logistical,[53] financial,[54] and human[55]. Switching must be done between semesters (at a cost of at least $200) because of the significant increase in costs of switching during

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bulk or even *all* of the major taken there. Half a sequence (such as Chemistry 101 in one semester followed by Chemistry 102 the next semester) may not be accepted for credit. Students should take both halves before trying to transfer. Students appended to their appellate brief pages from "The College Handbook for Transfer Students" which explains in more detail the problems and shortcomings of transferring. There is a financial disincentive to accepting URI credits as any university that accepts a URI-earned credit has one less course to sell to the transferring student.

[53] Form-filling, letter-writing, travelling, interviewing, moving, obtaining new housing, etc.. In more detail: contacting the other university, reviewing its materials to determine whether it has courses the student wants and is otherwise attractive, discovering whether (and if so to what extent) it will accept URI academic credits, completing an admissions form, submitting SAT scores, obtaining letters of recommendation, obtaining an academic transcript from URI, paying the other university an admissions fee, travelling to the other university for an admissions interview and/or to see its campus, completing a housing form (or arranging non-campus housing), moving from URI to the other university, attending an orientation session at the other university, plus all of the mailing and telephone chores.

[54] The costs of transferring from URI to another university (apart from far higher tuition rates for the 56% of URI students who in 1991 were Rhode Islanders) include the cost of performing all the above-described tasks, including the opportunity cost - the time required to do these tasks would amount to at least ten hours - time that could have been spent working at $5 per hour. The *total* cost would be *at least* $200, and greater the further the other university is from URI, if the student looked at more than one university, and/or had to complete a financial aid form (FAF).

[55] Emotional reasons for remaining at URI, e.g. spouse/boyfriend/girlfriend also student at URI or living in R.I., and, non-romantic reasons, e.g. leaving behind friends and/or family, affinity for URI or R.I., etc..

semesters.[56] Switching is impossible for those not admitted elsewhere[57]. Switching also entails abandoning whatever attractions (such as cheap in-state tuition rates) made URI the student's first or only choice of university,[58] and, abandoning

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[56] The above analysis of switching costs (of at least $200) assumes students *can* transfer at a cost-minimizing time. Any transfer during a semester would waste: a semester of URI tuition (as uncompleted courses do not earn credits), some rent (if living off-campus), if living in URI housing a housing fee (contracted per academic year, not per semester) plus meal plan fee (undergraduates with URI housing are automatically billed for a minimum number of meals for the entire semester. The *least* an undergraduate with URI housing could pay for URI meals was, *per semester*: 1990-91 $801.50, 1991-92 $875, 1992-93 $919. Obviously a student cannot eat URI meals if s/he has transferred from URI.) Students would also waste by transferring during a semester: the student assessment fee, and other URI fees, including the clinic fee and URI-billed insurance premium. Students with LINA insurance could only transfer at the *end of an academic year*, because, LINA insurance was billed annually and its (supposed) coverage was contingent upon a student first seeking treatment at the URI clinic - which clearly was not feasible if s/he had transferred to another university. If such a student had transferred at any time during the academic year (e.g. after the first semester) s/he would have lost the remainder of his/her insurance coverage. Two-semester courses can also financially preclude transfer for the entire academic year.

[57] Compared with many other universities URI is only moderately difficult to enter as a candidate for a first degree. Source: Peterson's "Entrance Difficulty Index" showing there are at least 200 universities that are more difficult to enter than URI.

[58] E.g. satisfaction with URI's education product. URI students do find that subsequent semesters of URI education are appealing, as otherwise they would not return to URI in high numbers for subsequent semesters of URI education. Discovery was stayed and plaintiffs could not press for the numbers of students who return to URI, first asked for in interrogatories in February 1992. URI's campuses are also unique. "In part because of its unique location near the ocean and six miles from Narragansett Bay, the University has developed strong marine programs and has been designated one of the national Sea Grant colleges." 1990-91 URI Bulletin for undergraduates. URI also has the "165-acre Narragansett Bay Campus" and the "2,300-acre" "Alton Jones Campus" in western R.I.,

whatever advantages accrue as a result of being at URI.[59] The cost of URI's tuition is far greater than the cost of the UHS fee and LINA insurance,[60] and students attend URI for

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with its "woods, fields, streams, and ponds" "the site of environmental education, research, and conference facilities." Id. **URI's *unique* campuses contribute significantly to URI's academic courses (and in some cases, such as marine courses, indispensably).** In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958) leases of *unique* land tied preferential routing provisions; power was held to exist in the tying market. Students also have their own personal reasons for wanting to remain at URI / not wanting to transfer elsewhere, e.g. a wish to develop contacts in R.I. as planning to live and/or work in R.I. after graduation.

[59] E.g. students who have been at URI for at least one semester are far better situated to learn about the nature of URI's offered courses, URI's professors' approaches to their subjects, and, their styles and strengths and weaknesses, than to learn about such matters concerning another university's courses and professors. No one ever publishes such "inside" knowledge, yet it is invaluable to select "good" courses and to avoid "bad" ones. Some URI professors must surely have authored copyrighted student textbooks. "The requisite economic power is presumed when the tying product is ... copyrighted." *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962). But no URI course, whether based on copyright materials or not, is interchangeable with any other university's course, as all professors at all universities *necessarily* bring to their work something unique of themselves. **Given that *movies* - so often a formula product - were held *not* interchangeable in *Loew's Inc.*, different universities' courses should also be held not interchangeable. A student who switches from URI loses the uniqueness of URI's courses. "[U]niqueness" alone can even suffice to show the requisite tying market power, *Loew's Inc.*, 371 U.S. at 45 n.4.** To measure the uniqueness of URI's courses is of course impossible, but it is vast. (To help show the scale of URI: URI has over 700 faculty, and, its 1992-93 research expenditure was over $33m. These two facts are judicially noticeable, based on URI data, but they were not alleged below.)

[60] Summary of URI's prices

Prices for in-state undergraduate tuition: 1987-88 $1,670, 1988-89 $1,770, 1989-90 $1,876, 1990-91 $2,046, 1991-92 $2,618, 1992-93 $2,874. **Prices for out of state undergraduate tuition:** 1987-88 $5,477,

its educational products, not its health risk coverage products. Each semester the costs of switching (at least $200) exceeded URI's price increases in the tied products.

The First Circuit also blundered hideously by disregarding *all* of the above "switching" facts. Further, the First Circuit was muddled and incorrect in assuming that "the college credit value of the first semester is neither nontransferable nor without economic or educational value in the future even if the student does not remain at URI."[61] First, "college credit" is not even a purchase (nor therefore an initial purchase or tying product), so the assumed transferability of "college credit" is beside the point. Second, college credits do not attach to neat *semester blocks*, but only to *individual courses* in which a student attains a pass grade. To earn a credit requires hard work and money for books, unlike a Kodak copier, which needs no consumer-work or extra expense to make *it* transferable. Third, there is scant if any "economic value" to a URI student who "drops out" of higher education after the first (or a later) semester, as even URI graduates face a bleak employment market. Fourth, the "educational value in the future" of a first URI semester is minimal, as students in the first semester acquire few if any of the lasting intellectual skills higher education has to offer.

1988-89 $5,696, 1989-90 $5,982, 1990-91 $6,550, 1991-92 $7,970, 1992-93 $9,308. **Prices for in-state graduate tuition**: 1987-88 $1,750, 1988-89 $1,856, 1989-90 $1,968, 1990-91 $2,146, 1991-92 $2,746, 1992-93 $3,014. **Prices for out of state graduate tuition**: 1987-88 $3,932, 1988-89 $4,168, 1989-90 $4,510, 1990-91 $4,938, 1991-92 $5,952, 1992-93 $6,952. **Prices for insurance premiums billed to URI students (both graduate and undergraduate in-state and out of state)**: 1987-88 $158, 1988-89 $182 (Aetna), 1989-90 $226 (Aetna) 1990-91 $282 (LINA), 1991-92 $330 (LINA), 1992-93 $369 (All American). **UHS fees (for all full-time students except graduates with HMO or military benefits coverage)**: 1987-88 $179, 1988-89 $188, 1989-90 $200.50, 1990-91 $227.00, 1991-92 $248, 1992-93 $312.00.

[61] Appellate Opinion at App. 13A.

The First Circuit misunderstands the nature of a "lock-in"

The First Circuit refers to the "initial, unamortized investment in a Kodak copier", notes it is an expensive and complex durable good with little resale value,[62] and attaches great significance to these attributes, as though a consumer virtually cannot show a lock-in without such an initial purchase. But *Kodak* simply does not indicate any particular *sort* of pressure or pressures that must exist in order for there to be a lock-in. Thus, lock-ins may be caused by *any sort/s* of pressure/s (provided sufficiently large), whether generated by the initial purchase or otherwise, and whether the pressure/s arise/s before, after, or simultaneously with (or from) the initial purchase. The *manner* in which consumers are locked-in is only of secondary (if any) antitrust significance to their *being* locked-in. First and foremost the antitrust significance of a "lock-in" is that it *empowers* the seller to *force* the locked-in consumers into tying arrangements. Assuming the consumer cannot switch, the only way *not* to be "locked-in" is if: a) the consumer foreknew (or should have foreknown) enough about the package to avoid buying the initial purchase, *and*, b) was free to choose not to buy the initial purchase. Only if both a) and b) are true can the consumer be held to have chosen his/her situation and thereby be unentitled to a "lock-in" type of tying claim. (Of course if switching were practical no lock-in would exist even if a) and b) were false). The First Circuit implicitly and mistakenly equates foreknowledge of a package with freedom of choice not to buy it. The First Circuit overlooks that even absent a monopoly or AEP in the initial purchase market, and even if consumers have foreknowledge of the package, there may exist a minority of vulnerable consumers who are under tremendous pressure to buy the initial purchase, even though most consumers in the initial

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[62] Appellate Opinion at App. 13A.

purchase market are immune to that pressure.[63] Thus, even if one shares the First Circuit's incorrect assumption that university applicants could have package-priced URI's package, one cannot thereby conclude that *the applicants who enrolled at URI* could have avoided URI. In fact, they could not rationally have avoided URI, for two main reasons: URI's in-state tuition rates were far cheaper than tuition rates they could obtain elsewhere,[64] (for the 56% of them who were Rhode Islanders), and/or URI having the best academic reputation of any university to which *they* were admitted. Obviously with respect to the students who did enroll at URI, URI was compellingly attractive, as URI won their business ahead of *all* the competition. Even if *these* students had foreknown all about URI's package, including URI's fraudulent, undefined, and otherwise inferior health risk coverage products, *they* would still have enrolled at URI, as the cost of these products is trivial compared to the savings on cheap tuition fees (and other benefits) they would obtain by attending URI.[65] And the same is true at any university;

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[63] "Had previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy, Kodak's 'market power', i.e. its leverage to induce customers to purchase Kodak servicing, could **only have been as significant** as its AEP in the copier market ..." (Emphases added) Appellate Opinion at App. 14A. In the initial purchase market Kodak could have had great leverage over some consumers, even though little leverage over the vast majority of consumers. The significance of leverage over a relatively few vulnerable consumers is of antitrust concern as these *are* locked-in, and so, with respect to *them*, the seller's market power should be measured in the locked-in market, not in the initial purchase market.

[64] at any comparable university. URI is Rhode Island's only State university. Detailed tuition price data for over 1,500 universities was cited in the appellants' brief and filed in the District Court.

[65] At App. 10A the First Circuit in effect acknowledged that appellants had noted the cross-inelasticity of demand between the initial purchase market and the tied product markets, but the First Circuit then totally failed to respond to this important argument. "The extent to which one market

students attend the best[66] university to which they have been admitted, regardless of its health risk coverage products.[67]

Summary & Conclusion re. questions presented # 2 & # 3

To package-price URI's package was impossible. To switch from URI was grossly impractical (and for some students impossible) for financial and other reasons. Thus, students *were* locked-in to buying subsequent semesters of tuition from URI, and therefore URI *did* have AEP in the tying product market. The First Circuit reached its conclusion, of no lock-in (no AEP, and thus no valid antitrust claim), by disregarding numerous alleged facts that show students *were* locked-in, and, by making major and incorrect assumptions of fact. Such terrible gutting of the alleged facts in deciding a 12(b)(6) motion flouts the Court's law,[68] and warrants its supervision. The First Circuit's analytical errors listed in question presented # 2, and discussed above, also warrant the Court's supervision.

The First Circuit's requirements for a "lock-in" radically misconceive *Kodak*. Now sellers can fearlessly create and exploit consumer-bases that do not fit the First Circuit's "lock-in" criteria. URI is still doing so.

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prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the 'cross-elasticity of demand.'" (Citations omitted.) *Kodak*, 112 S.Ct. at 2083.

[66] "best" in their view, affordability of tuition being one major factor, and academic standing another.

[67] Obviously URI was not compellingly attractive to most university applicants as most were not Rhode Islanders (and therefore ineligible for URI's in-state tuition rates). Also, thousands who went elsewhere did so as these other universities have better academic reputations than URI's.

[68] The Court's 12(b)(6) case law is quoted above on p.13 n.31.

As to question presented # 4: the First Circuit obstructed the students' right to trial by jury.

The First Circuit's above-described erroneous assumptions of fact, and, massive disregard of students' allegations of fact, obstruct a Seventh Amendment right to have the facts decided by a jury, given students timely demanded trial by jury and sought antitrust treble damages.[69]

As to question presented # 5: the Constitution contains a liberty / privacy right to contract with a doctor of one's own choice, free from State interference (absent a compelling State interest). The First Circuit's rejection of said right conflicts intolerably with Supreme Court precedent. If the Court has not already recognized said right, it should do so. Said right was violated if the alleged facts are true.

The Constitution contains liberty to contract[70] and privacy[71] rights.[72] One may need and/or want to

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[69] "[T]he right to trial by jury applies to treble damages suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, ..." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959).

[70] "[L]iberty ... denotes not merely freedom from bodily restraint but also the right of the individual to contract, ..." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[71] emanating from the Fourteenth Amendment's "liberty", and rights implicit in the Ninth Amendment - *Griswold v. Connecticut*, 381 U.S. 479 (1965) or "implicit in the concept of ordered liberty" *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). E.g. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraceptives), *Roe v. Wade*, 410 U.S. 111 (1973) (right to abort a pregnancy) - all matters of the utmost privacy. The Constitution's privacy right covers "the individual interest in avoiding disclosure of personal matters [and] the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Students disclosed personal medical matters to URI/State medical

contract/consult with a doctor of one's *own* choice. Privacy and trust are crucial for effective psychiatric, contraceptive, and substance abuse counselling. LINA conditioned coverage for *any* treatment obtained outside URI, on a student having first sought it at URI. This barbaric condition violated the students' privacy rights. If students consult non-State doctors of their *own* choice, they must pay a *second* time for their health care, even assuming they can afford to do so. So, the mandatory UHS and LINA charges financially penalize students for exercising their liberty / privacy rights, and thus violate those rights. The First Circuit asserts that the alleged liberty to contract/privacy right lacks case law authority,[73] yet

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personnel, and this private information was stored at UHS, which URI previously admitted was filled with fire violations. The records were under the custody of the UHS administration, which was implicated in all the misconduct listed in question presented # 5.

[72] Judge Pettine misconceived the liberty to contract claim as an economic issue, overlooking its privacy aspects. App. 38B-39B. He assumed that State law authorized the UHS and LINA charges, and that students were making a substantive constitutional challenge to State economic legislation. Yet no such challenge was made; plaintiffs had clearly alleged that the UHS fee and URI's mandatory health insurance requirement both *violate* State law. Counsel did not move for reconsideration (the First Circuit implies he should have done - App. 15A n.11) as he considered no procedural rule supported it. Further, even moving for reconsideration would have seriously risked *losing* plaintiffs' right to appeal. The dismissal of plaintiffs' case was not partial, and so a "reconsideration" motion could easily have been treated as a F.R.Civ.P. 60(b) motion, (*Aportria v. Maine Turnpike Authority*, 672 F.Supp. 536, 537 (D.Me. 1987), rather than a F.R.Civ.P. 59(e) motion merely to alter or amend), and, thus *failed* to have stayed the time to appeal. Counsel would have been gambling on *not* running out of time to appeal - a poor gamble given the case's factual and legal complexity. Rules of procedure are unfair if like a casino. The *new* F.R.A.P. 4(a)(4)(F) (which took effect *after* students' chance to move for reconsideration ended) is a vast improvement; it *stays* the appellate clock until determination of a F.R.Civ.P. 60(b) motion (if filed within 10 days of entry of judgment).

[73] App. 14A-15A.

the Court surely has decided that said right exists.[74] If the Court has *not* so decided, it should, such is that right's profound significance to a free people.[75] The State's interference (noted in question presented # 5 and elsewhere in the petition) is: coercive, dishonest, intrusive, medically unacceptable, hypocritical, and wastes students' money.

The First Circuit implies URI did not "deprive" students of the claimed "liberty", as students (supposedly) had "full knowledge"[76] of the mandatory UHS and LINA charges, and paid anyhow. This consent argument disregards the lock-in, LINA's fraud, and, URI's non-disclosure of that fraud *and* of the defects of UHS coverage. Thus, URI *did* "deprive" students of "liberty" to contract, as no student gave *informed* consent to pay for the bogus products.[77] Further, threatening expulsion from URI was extremely coercive, as

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[74] For instance, regulations "insisting upon recitation of a lengthy and inflexible list of information" designed to influence the woman's informed choice between abortion and childbirth were unconstitutional "'obstacles in the path of the doctor upon whom [the woman] is entitled to rely for advice in connection with her decision.'" (Citation omitted.) *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 445 (1983). "[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child-rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room or as otherwise required to safeguard the right to intimacy involved." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973).

[75] "In a constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." (Citations omitted.) *Board of Regents v. Roth*, 408 U.S. 564, 572 (1971). A right to choose one's own physician, free from State interference, surely falls within any civilized "broad" concept of liberty.

[76] Appellate Opinion at App. 15A.

[77] Some URI students had no objection to paying for the UHS and LINA products, but only because they were deceived about said products.

a university education is of major significance to an individual's life and work. An attempt to transfer merely to avoid the UHS and LINA charges would have been highly irrational, and, would probably have failed, as other universities would regard such a student as a troublemaker.

Conclusion regarding all questions presented

The First Circuit's "lock-in" criteria misconceive *Kodak* and subvert tying law. *Kodak* requires the lower courts to scrutinize complex "information" and "switching" facts. Yet, even in a 12(b)(6) context, the First Circuit disregarded vital "information" and "switching" allegations, assumed incorrect facts, and, mishandled students' arguments. The First Circuit obstructed students' Seventh Amendment right to have a jury decide the facts. The sooner the Court makes the liberty / privacy right explicit, the better, for the People, and, most urgently, for hundreds of thousands of State university students who pay mandatory health services fees (App. 47D). Unfettered and informed choice for all health care consumers is now pivotal to reduce costs and improve quality, as Congress, in the foreseeable future, is most unlikely to pass a comprehensive health care reform Bill. The First Circuit overlooked the males' Equal Protection claim under *Bray*, and, Equal Protection law in other Circuits. The other Equal Protection Clause issues concern its worth and meaning, and are of permanent import to academe, insurers, the States, and the Nation.

Therefore, the petition should be granted.

Respectfully submitted,

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